



Hearing Clerk
Office of Administrative Law Judges
Room 1081-S, USDA Stop 9203
1400 Independence Ave., S.W.
Washington, DC 20250-9203
FAX 202 720-9776

RE: Docket Nos. AO-341-A6; FV02-921-1, Federal Register Volume 69, page
23,330 (April 28, 2004)

To Whom It May Concern:

The following comments, on behalf of Clement Pappas & Co., Inc., are in response to certain of the USDA's recommendations on the proposed amendments to the Cranberry Marketing Order. Our comments are outlined according to each material issue on which we wish to comment.

Material Issue Number 2 – Development of the Marketing Policy (Volume Control) (929.46)

Clement Pappas supports deleting the decision-making dates from this section. The date currently in the order by which a decision for a producer allotment must be made is problematic (too late in the season for farmers to make decisions on growing practices, if there is a regulation). We also agree with the USDA on the second key change – modifying the criteria to be considered in recommending a marketing policy. The criteria that the USDA proposes to delete should *not* be used for volume regulation decisions because they are secondary to making a good volume control decision, and their exclusion would not materially affect the supply/demand of cranberries.

Material Issue Number 3 – Revision of Sales History (929.48)

This amendment needs to be adopted to provide more fairness to all growers when the CMC is determining their sales history (production), prior to a volume regulation. USDA made a significant effort to ensure equitable treatment of growers when the volume control provisions were utilized during the 2000 and 2001 crop years. The old system, however, did not sufficiently allow for increasing production from young plantings and penalized organic and fresh fruit growers when their production did not materially

CLEMENT PAPPAS & CO., INC.
10 N. PARSONAGE ROAD, SEABROOK, NEW JERSEY 08302-7550
(856) 455-1000 FAX (856) 455-8746

contribute to the oversupply. The proposed changes should be adopted because they would establish a more equitable system for calculating grower sales histories, and would allow the segregation of fresh sales history if necessary.

Material Issue Number 4 -- Catastrophic Events That Impact Growers' Sales Histories (929.48, a, 4)

While this amendment could create considerable work for the Committee in reviewing grower appeals in crop loss situations, it should be adopted because it provides the CMC with more flexibility to protect growers in both common and unique crop loss situations.

Material Issue Number 7 -- Growers Who Do Not Produce a Crop During a Year of Regulation and Assignment of Their Allotment (929.49)

The hearing record clearly demonstrates that this section is not intended to obviate contractual arrangements between growers and handlers, but the provision proposed by the Department is open to differing interpretations of this issue. The Department should amend this section to clearly state that it would not supersede contractual arrangements. This was clearly the intent of the proposal. When asked specifically about the this provision, the CMC Manager noted, "we're not trying to supersede" contractual obligations and "I don't believe that it was the Committee's intent to do that."

To ensure clarity in this provision and consistency with the Committee's intent, the Department should amend Section 929.49 to include the following language in a new paragraph:

(k) With the exception of issuance of annual allotments, nothing in the section shall be construed as superseding contractual agreements between growers and handlers.

It is disruptive enough to a handler's sales and marketing program to have a volume regulation. This provision creates the potential for a handler(s) to bear a disproportionate share of the load in a volume regulation year. Conceivably, enough growers of an individual handler could exercise this option to destroy that handler's marketing and sales program and cause ruin to the handler. This is untenable.

Material Issue Number 10 -- Dates for Recommending Volume Regulations (929.51)

The USDA is recommending the inclusion of a provision that would allow the Committee to recommend a producer allotment regulation after March 1 when "unforeseen" circumstances preclude the Committee from making an informed recommendation early in the year. By March 1st of any year, growers will have already incurred significant costs to maintain their bogs and prepare for the upcoming growing season. The March 1 deadline was originally imposed to ensure that growers would have ample time to limit the input costs. The reason(s) to institute a handler withholding later than March 1st would have to be compelling, and the Department should commit to carefully and thoroughly monitoring any exercise of this authority.

Material Issue Number 11 -- Exemptions from Regulations (929.58)

The original intent of this proposed amendment was to add authority to exempt fresh and organic cranberries from any, or all, regulatory requirements imposed under the order. The language, as since modified and now proposed, more broadly states "the Secretary may relieve from any or all requirements pursuant to this part the handling of such forms or types of cranberries as the Committee, with the approval of the Secretary, may prescribe." The proposed language is too broad and should be rejected by the Department.

As the Department noted, the proposed language could allow for the exclusion of an entire variety (e.g. Stevens). No justification has been provided for such a sweeping exemption provision, and for good reason -- because none exist. Niche markets (e.g., organic or fresh) may merit exemption from regulation because they are small and/or developing markets that could be severely compromised by inadequate supply. It is inconceivable that a certain variety of cranberry could be threatened or irreparably harmed by a regulation. To the extent that a variety may be used for a particular niche market, that market can be protected through the existing exemption provision. Additionally, this more broadly stated amendment could allow the Committee to create a loophole for abuse that could benefit one growing region or state to the detriment of another.

For these reasons, the Department should not include a provision that allows for the exemption of specific types of cranberries.

Material Issue Number 13 -- General Withholding Provisions (929.54)

This provision authorizes "Handler Withholding" in a volume regulation year. The USDA is recommending a modification to provide that any restricted percentage be applied to the volume of *marketable* cranberries acquired by each handler. This method of volume regulation, except for very small quantities of fruit, is a very poor method of volume control in comparison to a producer allotment method of volume control. To dispose of berries after they have been harvested, transported, cleaned, graded, shipped to the freezer and stored would be much more expensive and much more difficult to administer than a producer allotment.

Material Issue Number 14 -- Handler Marketing Pool and Buy-Back Under the Producer Allotment Program

The USDA is recommending that the order should NOT be amended to include the establishment of a "handler marketing pool" under the producer allotment provisions of the order, a concept that was proposed by Clement Pappas and others. Under this proposal, in any crop year in which a producer allotment regulation were recommended, a "handler marketing pool" would be established. Handlers determined to be in surplus would have to contribute fruit to the pool, and Handlers determined to be in deficit would have access to those berries in the pool. This proposal is identical to the language that was drafted by the CMC amendment subcommittee.

The handler marketing pool proposal is innovative and had, at one point, the broad support of both handlers and growers. Clement Pappas strongly protests the USDA's recommendation to exclude this amendment proposal, and requests that the Department reverse its decision and allow the proposal to be submitted as part of the grower referendum on the proposed amendments.

To justify its decision, the Department noted that this proposal was rejected because "[w]ithout resolution on this issue [price] and cohesiveness from all segments of the industry, the handler marketing pool concept would not work." 69 Fed. Reg. 23,350 (April 28, 2004). These standards are inappropriate for evaluating the proposed marketing pool amendment, as they are impossible to meet. As the Department is well aware, there has always been significant disagreement within the industry on issues relating to price, and it is naïve to believe that the industry could ever come to agreement on this issue. Industry cohesiveness is also an impossibly high hurdle, and should not be relied on by the agency as a criterion for evaluating proposed amendments. If this standard were applied across the board, all of the other proposed amendments, and the order itself, would fail.

Since the Department has not provided an adequate justification for rejecting the handler marketing pool, it should allow the proposed amendment to proceed and be voted on by the growers themselves. Allowing the growers to decide the fate of this proposal is the only way to determine if the proposal can meet the Department's untenable requirements for consensus on price and cohesiveness from all segments of the industry.

Material Issue Number 17 -- Expansion of Production Area

USDA has rejected the proposal to expand the production area to include Maine, Delaware, and the entire State of New York. This is based on a faulty reading of the underlying statutory authority, and, accordingly, the Department should include this proposal in the final decision.

The Department's decision is based on the incorrect assumption that the underlying statutory authority "requires that a marketing order be limited in its application to the smallest regional production area practicable." 69 Fed. Reg. 23,352 (April 28, 2004). This is not correct. The Agriculture Marketing Agreement Act of 1937 allows an order to cover all production areas when "the Secretary finds that the issuance of several orders . . . would not effectively carry out the declared policy of this chapter." 7 U.S.C. §608c(11)(A). In other words, an order can cover all production areas unless it is more effective to have multiple orders covering one commodity.

Clement Pappas believes that a Federal Marketing Order should include all producers and production areas in the United States. This is the fairest approach for all growers and handlers, and is without a doubt the most effective means of carrying out the policy of the Agriculture Marketing Agreement Act. A USDA-controlled marketing order should expect all growers to participate in, and share equally in that order. All growers should be required to participate in a volume regulation proportionate to their base production without regard to location. Since the Department has not provided a satisfactory and

legally sufficient justification for rejecting this proposal, it should be included in the final decision and voted on by growers.

Conclusion

Clement Pappas appreciates this opportunity to comment on the recommended decision, and looks forward to working with the Department as this process continues.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Brooke Peterson". The signature is fluid and cursive, with the first name "A." and last name "Peterson" clearly visible.

A. Brooke Peterson
Director Grower Relations